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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN SIMON,

Defendant and Appellant.

A097869

(Alameda County
Super. Ct. No. 131756)

Defendant John Simon appeals from an order of commitment under the Sexually Violent Predator Act. He raises a host of issues: (1) the court erred in not instructing the jury that it had to find he had serious difficulty controlling his behavior; (2) there was insufficient evidence that he had serious difficulty controlling his behavior; (3) the court erred in not defining the word “likely” as required by *People v. Roberge* (2003) 29 Cal.4th 979; (4) the court erred in denying his motion for a *Kelly*¹ hearing on the Static-99 psychological test; and (5) the court erred in denying his motion for mistrial based on judicial misconduct. We disagree with each of Simon’s contentions and affirm the order of commitment.

¹ *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*).

PROCEDURAL AND FACTUAL BACKGROUND

In 1985, Simon was convicted of three counts of committing a lewd act on a child under 14, and was sentenced to three years in prison. (Pen. Code, § 288, subd. (a).) In 1996, he was convicted of one count of committing a lewd act on a child under 14 under Penal Code section 288, subdivision (b), and was sentenced to eight years in prison. On December 16, 1997, the Alameda County District Attorney petitioned to have Simon committed as a sexually violent predator under Welfare & Institutions Code sections 6600 et seq. A jury sustained the petition and the court ordered him committed for two years at Atascadero State Hospital (Atascadero). This timely appeal followed.

At the sexually violent predator commitment trial, two psychologists testified for the prosecution. Dr. Charles Jackson evaluated Simon in both 1997 and 2000. In 1997, he met with Simon after reviewing his medical and psychological records, police and probation reports, and court records. Those records indicated two qualifying offenses under the Sexually Violent Predators Act (SVPA). For purposes of the issues raised in this appeal, we need not address the specific facts of the two qualifying offenses.

In 1997, Dr. Jackson diagnosed Simon with pedophilia, non-exclusive type; personality disorder not otherwise specified with antisocial and paranoid features; and alcohol abuse in institutional remission. Dr. Jackson noted that Simon's records indicated some psychotic disorders. Although he saw no symptoms, he noted in his report "rule out psychotic disorder versus malingering." Dr. Jackson testified that antisocial personality disorder and substance abuse exacerbate pedophilia. In 1997, Dr. Jackson based his opinion that Simon was likely to reoffend, in part, on actuarial data risk factors such as the fact that Simon's age was 19 at first arrest and age 28 at first sex offense arrest.²

Dr. Jackson wrote a second evaluation in 2000. Simon refused to speak with him at that time. Dr. Jackson reviewed information previously not available to him. He

² The Static-99, the risk assessment instrument in use at the time of trial, was not yet in existence.

learned that Simon was first arrested at age 12, not at age 19, which put him at an even higher risk of reoffending. He also learned that Simon was acquitted in 1982 of a sex offense. Dr. Jackson reviewed Simon's updated medical history and his records from Atascadero, which indicated that Simon had refused to continue further than the pretreatment phase in the sex offender treatment program at Atascadero. The records from Atascadero indicated that Simon was "argumentative, agitated, making disrespectful remarks particularly to female staff." He refused to speak to a probation officer because she was female. He had difficulty interacting with female staff, and typically reacted to directions from them by becoming "loud and indignant and muttering" comments such as "those damn prostitutes." He was involved in a fight with another inmate while at Atascadero in which he "shattered the patient's face." A staff psychiatric technician testified that he believed that Simon was defending himself.

Dr. Jackson, again, concluded that Simon was suffering from a mental disorder, but modified his previous diagnosis. Dr. Jackson's diagnosis of pedophilia and alcohol abuse in institutional remission and personality disorder not otherwise specified with antisocial and paranoid features was unchanged from 1997. However, based on Simon's score on the Hare Psychopathy Checklist, Dr. Jackson testified that Simon was a psychopath, someone with a "heightened level of antisocial personality disorder." He defined a psychopath as an "individual who has no feelings for others. They tend to be number one. They will have both a combination of a callous disregard for feelings of others and a criminal lifestyle."

Dr. Jackson testified that a diagnosis of antisocial personality disorder is appropriate where an individual meets at least three of seven criteria. He found that Simon met all seven. One of the criteria is deceitfulness and manipulation of others. Dr. Jackson testified that Simon had manipulated the mothers of the victims and Josalyn Harris, a counselor who testified on his behalf. Simon had written "volumes and volumes" of letters to Harris requesting personal favors and legal assistance. The letters were romantic in nature, and in one instance included a list of 211 questions for her court

testimony. Dr. Jackson testified that “it was obvious to me in his letters that this was not a therapeutic relationship.”

During his second evaluation, Dr. Jackson used the Static-99 risk assessment instrument in determining whether Simon was likely to reoffend. The predictive accuracy of the Static-99 is “moderate,” with a correlation coefficient of .34. Dr. Jackson determined that Simon had a score of 7. A score of 6 gives a prediction of reoffense of .39 in five years, .45 in ten years, and .52 in fifteen years. Dr. Jackson also considered Simon’s score of 34 on the Hare Psychopathy test indicative of a high risk of reoffending. He considered a number of other risk factors, including problems with supervision while incarcerated, intimacy deficits, and engaging in “negative social influences,” “antiwoman” and “child-molest-tolerant” attitudes, which included feelings of “sexual entitlement . . . regardless of the relationship with a person . . .” Dr. Jackson testified that Simon’s lack of remorse, blaming others for his behavior, alcohol abuse, and “chronic lifelong pattern of anger and hostility [and] verbal threats” were additional indicators of a higher risk of reoffense.

Dr. Jackson opined that Simon’s conversion to Islam did not have any impact or predictive value on whether he would reoffend. He testified that while “frequently individuals’ lives are turned around by spiritual values . . . from a research standpoint, there is no indication that this lowers risk.” Dr. Jackson’s opinion was that Simon was a sexually violent predator.

The second prosecution expert, Dr. Wesley Maram, a licensed forensic and clinical psychologist, also evaluated Simon twice. In October 1997, he reviewed Simon’s prison and medical records and he interviewed Simon. He administered the Hare Psychopathy test, which uses twenty different criteria to determine whether an individual is a psychopath. Simon “scored about as high as I’ve ever scored anyone [H]e scored 34. Thirty-three is the cutoff for severe psychopathy and he got 34.” Dr. Maram diagnosed Simon with residual schizophrenia, alcohol dependence, and antisocial personality disorder, and indicated that he manifested signs of being paranoid.

Dr. Maram conducted a second evaluation in 2000. Simon refused to speak with him. Dr. Maram reviewed his own records as well as information updated since his last report. He opined that Simon was still suffering from the same mental disorders he previously diagnosed and Dr. Maram concluded that he “was mistaken in not diagnosing pedophilia [in 1997] based on the history . . . and other information. . . .” In 2000, Dr. Maram had more information to base a diagnosis of pedophilia, including an incident in which Simon was acquitted of having intercourse with a girlfriend’s 12-year-old daughter. He administered the Static-99 test and Simon’s score was 7. Dr. Maram agreed with Dr. Jackson that Simon had a high risk of reoffending.

Dr. Maram’s opinion that Simon was likely to reoffend was based on Simon’s deviant sexual preferences, including his molestations of children and his “lewd and crude and hostile language towards adult women that’s been evident throughout his files.” He testified that Simon had serious “intimacy deficits,” meaning lack of “capacity to form a stable, strong, intimate relationship. . . .” Additionally, Simon “doesn’t seem to have any internal controls to regulate himself.” Dr. Maram “had a very high degree of confidence that [Simon] would reoffend in a sexual way.”

Dr. Lee Coleman, a psychiatrist, testified for the defense. He opined that psychiatric or psychological evaluations are not science, that the mental health profession has not demonstrated an ability to predict future behavior, and that there is no purpose in diagnosing patients with mental disorders unless there is an underlying medical reason for their symptoms. He concluded that diagnosis of mental conditions “is really not the fairly reliable process that happens when other kinds of doctors do diagnosis.” Dr. Coleman considers the Diagnostic and Statistical Manual of the American Psychiatric Association, a reference work describing the categories of mental disorder diagnoses, a “fraud.” Dr. Coleman noted that two psychiatrists and one psychologist, other than Drs. Jackson and Maram, evaluated Simon in 1997 and did not find he suffered from any severe mental disorder. He testified that he had no opinion on whether Simon is a sexually violent predator or is likely to reoffend.

The defense offered Joselyn Harris, an Alameda County rehabilitation counselor, as an expert. The court denied the request to qualify her as such, but permitted her to testify as to her personal observations. Between 1992 and 2001, Harris saw Simon for over 100 hours in counseling sessions. Harris testified that Simon never indicated to her that he had any sexual interest in children, nor did he keep pictures of children unrelated to him in his cell. Simon always behaved appropriately with her, with no “sexual overtones.”

Simon wrote Harris letters in which he expressed romantic thoughts about her. In one letter he wrote that he “was overly excited to hear your smooth, safe, tender, kind words . . .” She testified that some would say that she should have advised Simon not to write her letters of that type, but she did not agree. In reviewing Simon’s records, both Dr. Jackson and Dr. Maram formed the opinion that Simon’s relationship with Harris “was a nontherapeutic, highly unprofessional relationship.” Harris counseled Simon after two other inmates stabbed him in 1994. She wrote on a mental status exam form in his file that Simon had post-traumatic stress issues as a result and that he was “very intense with these demands and speculations. Does calm self down and exhibits self-control. Not psychotic nor delusional, paranoid for sure.” Harris conceded that she was not qualified to make diagnoses.

Simon testified in his own defense. He related that he converted to Islam in 1999 when he went to Atascadero. He abstained from alcohol even though it was available to him there. While at Atascadero, he testified that he developed an attraction to a female staff member and wrote her a letter. He did not participate in the treatment program for sex offenders at Atascadero because he “didn’t see it going anywhere” and “as a Muslim . . . we don’t sit and discus[s] prior sexual actions”

He further testified that while he was in Alameda County jail awaiting trial, he flooded his cell because “there was no other alternative as to getting somebody’s attention as to the filthy cell.” He put toilet paper over the vents in his cell because he was cold, and covered the security cameras with paper because he did not want to be watched. Following these incidents, a deputy pepper-sprayed him.

Simon testified that he is not sexually attracted to children. He testified that he may have molested the girls in the incidents on which his two qualifying convictions were based. He testified that he was drinking at the time and that alcohol tends to “clog memories.” He told the jury that he is willing to “basically take the responsibility because of that drinking problem.”

Edward Hasib, the Muslim chaplain at Atascadero, testified that after Simon’s nominal conversion, Simon studied religion and Arabic with Hasib for two years.

DISCUSSION

I. *Serious Difficulty Controlling Behavior*

A. *The Jury Was Properly Instructed*

First, we address Simon’s contention that the trial court erred because it did not instruct the jury that in order to be committed under the SVPA, a defendant must have “serious difficulty controlling his behavior.” He is mistaken.

In fact, the trial court did instruct the jury properly on this element.³ The court instructed in relevant part as follows: “The term ‘sexually violent predator’ means a person who, (1) has been convicted of a sexually violent offense against two or more victims, (2), has a diagnosed mental disorder that makes him a danger to the health and safety of others in that it indicates he has *serious difficulty controlling behavior* and it is likely that he will engage in sexually violent predatory criminal behavior” (modification italicized). The court gave this modified version of CALJIC No. 4.19⁴ after discussion with counsel and with no objection by defense counsel.

³ On appeal, Simon apparently references a version of the jury instruction that was submitted but not given: “The term ‘sexually violent predator’ means a person who, (1) has been convicted of a sexually violent offense against two or more victims and (2) has a diagnosed mental disorder that makes him a danger to the health and safety of others in that *it is likely that he will engage in sexually violent predatory criminal behavior.*” (CALJIC No. 4.19; italics added.)

⁴ Two cases involving the adequacy of the standard CALJIC 4.19 are currently before the California Supreme Court. (*People v. Wollschlager* (2002) 99 Cal.App.4th 1303, review

B. *There Was Substantial Evidence That Simon Had Serious Difficulty Controlling His Behavior*

Next, Simon contends that there was no reasonable, credible, or substantial evidence that he had serious difficulty controlling his behavior and that the evidence in support of the order of commitment is all “history,” which has been superseded by his conversion to Islam. Simon argues that his recent negative conduct was in the context of survival in prison rather than the context of sexual behavior.

The record belies this contention. Simon’s long history of difficulty controlling his behavior continued even after his conversion to Islam. Simon’s disrespectful and manipulative behavior toward women continued and he attempted to use the Islamic faith as justification for his attitudes. On one occasion, Dr. Alarcorn, a female psychologist at Atascadero, approached the Muslim chaplain Hasib and related that Simon had told her that Hasib had advised him to “get in her face” meaning “be very aggressive and . . . disrespectful.” Hasib met with Simon and his treatment team, and advised Simon that disrespect towards women is “not the example of the prophet Muhammad.” Hasib felt that Simon accepted his admonishment.

Simon’s history indicated a pattern of “verbal threats and . . . lewd sexual statements made hostilely . . . primarily [toward] female staff” but also towards male staff. He had refused to speak to one probation officer because she was a woman. Simon wrote inappropriate romantic letters to two female staff members at Atascadero. Dr. Jackson characterized Simon’s relationship with Harris as manipulative. Simon shattered a patient’s face in a fight at Atascadero.

Dr. Maram specifically testified that Simon “doesn’t seem to have any internal controls to regulate himself” “He’s been very disruptive and at times dangerous in the hospital with his verbal threats and his lewd sexual statements made hostilely towards male or female staff, primarily female staff.” Dr. Maram testified that he was “a bit taken aback by [the] report” of incidents of Simon’s “aggressive, hostile, threatening behavior

granted Oct. 16, 2002, S109223; *People v. Williams* (2002) 98 Cal.App.4th 642, review granted July 17, 2002, S107266.)

. . . consistent with his earlier behavior” which occurred about a month or two before trial. As an example, Dr. Maram related the Alameda County Jail incident when Simon flooded his cell and covered the air vents and the surveillance camera with toilet paper. Simon refused to remove the toilet paper, and correctional officers sprayed him with pepper spray. Dr. Maram testified that the incidents were surprising to him because “I would think that he would have enough self-control not to be disruptive in a jail just before a trial.”

The record demonstrates substantial evidence that Simon had serious difficulty controlling his behavior, despite his conversion to Islam. As Dr. Maram testified: “Finding religion is quite different than practicing it. . . . It’s very common that people will make claims that they’re religious one way or the other and it has no bearing at all on their personality, their thinking or their behavior.”

II. *People v. Roberge Instruction*

Simon argues and respondent concedes that the trial court did not give a *sua sponte* instruction regarding the meaning of “likely” as required by *People v. Roberge, supra*, 29 Cal.4th 979. In *Roberge*, the Supreme Court held that the trial court must instruct the jury that in the phrase “likely [to] engage in sexually violent criminal behavior” the term “likely” means “the person charged as a sexually violent predator poses a substantial danger, that is, a serious and well-founded risk of committing a sexually violent predatory crime if released from custody.” (*Id.* at pp. 988–989.)

As in *Roberge*, we conclude that the error here was harmless. The *Roberge* court found beyond a reasonable doubt that the defendant suffered no prejudice from the failure to give that instruction based on the evidence indicating he was likely to reoffend. (*Roberge, supra*, 29 Cal.4th at p. 989.) The court stated that “[on] the facts of this case, defendant cannot complain that the jury found him to be a sexually violent predator while concluding that his risk of reoffense if released from custody was less than ‘substantial’ or ‘serious and well-founded’ ” (*Id.* at p. 989.)

The evidence here denoted that the risk of Simon reoffending was substantial, serious, and well founded. Two psychologists testified that he suffered from antisocial personality disorder, also known as psychopathy, as well as pedophilia and alcohol abuse in institutional remission. Dr. Maram testified that Simon scored “about as high as I’ve ever scored anyone” on the Hare Psychopathy test. Both prosecution experts agreed that Simon was likely to reoffend.

The evidence showed that Simon had a “lifelong pattern of anger . . . hostility [and] verbal threats.” He had numerous problems with supervision while in custody, including being argumentative, disrespectful to female staff, and “disruptive and at times dangerous in the hospital . . .” He attempted to manipulate Harris, and wrote inappropriate “romantic” letters to her and another woman on the staff. Simon made verbal threats and “lewd sexual statements . . . primarily [towards] female staff.” He refused to participate in the sex offender treatment program at Atascadero. Simon explained this refusal by stating that Muslims do not discuss prior sexual acts.

The evidence showed that Simon’s risk of reoffending was “substantial as well as serious and well founded.” (*People v. Roberge, supra*, 29 Cal.4th at p. 989.) As in *Roberge*, we “can easily conclude beyond a reasonable doubt . . . that defendant suffered no possible prejudice from the challenged jury instruction.” (*Ibid.*)

III. *Kelly Motion and the Static-99*

Simon argues that the trial court erred in denying his request for a *Kelly*⁵ hearing “on the methodology used by the state’s experts to determine that he was likely to commit sexually violent crimes in the future.” He maintains that Drs. Jackson and Maram based their opinions regarding his future dangerousness on the “unreliable” Static-99 test.

Neither Dr. Jackson’s nor Dr. Maram’s opinion was based solely on the Static-99. Their opinions were based on Simon’s behavior both before and during his incarceration,

⁵ The foundational requirement for admission of new scientific evidence now should be referred to as the *Kelly* test or rule. (*Cooley v. Superior Ct.* (2002) 29 Cal.4th 228, 243, fn. 3.)

his medical history, the results of the Hare psychopathy test, his lack of remorse, and his expressed attitudes about women and feelings of “sexual entitlement.”

Further, expert medical opinion is not subject to the special admissibility rule of *Kelly*. (*People v. Ward* (1999) 71 Cal.App.4th 368, 373.) “ ‘We have never applied the [*Kelly*] rule to expert medical testimony, even when the witness is a psychiatrist and the subject matter is as esoteric as the . . . prediction of future dangerousness . . . ’ ” (*People v. Stoll* (1989) 49 Cal.3d 1136, 1157.) “ ‘No precise legal rules dictate the proper basis for an expert’s journey into a patient’s mind to make judgments about his behavior.’ ” (*People v. Ward, supra*, 71 Cal.App.4th at p. 373.) *Kelly* applies only to “cases involving novel devices or processes, not to expert medical testimony, such as a psychiatrist’s prediction of future dangerousness or a diagnosis of mental illness.” (*Id.* at p. 373.) “*Kelly* applies only when a ‘new scientific technique’ is utilized. [¶] . . . [¶] [It does not apply] to the use of a standardized personality test to determine if an accused pedophile had a deviant personality.” (Simons, Cal.Evidence Manual (2002-2003 ed.) § 4:28, pp. 218, 220, citing *People v. Stoll, supra*, 49 Cal.3d at pp. 1157–1161.)

IV. Motion for Mistrial Based on Alleged Judicial Misconduct

Simon argues that the court erred in denying the motion for mistrial after it made comments allegedly comparing him to Hitler. “Absent exceptional circumstances, comments of the trial judge will not amount to reversible error. This is particularly true where . . . the jury was admonished to disregard the comment.” (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1043; see also *Mercado v. Hoefler* (1961) 190 Cal.App.2d 12, 23.) Here, the court admonished the jury the next court day and gave the standard jury instruction admonition of CALJIC No. 17.30.

The unfortunate remarks occurred during defense counsel’s questioning of Harris, the Alameda County vocational rehabilitation counselor. In an attempt to elicit testimony regarding Simon’s drawings of inventions, his defense counsel made an offer of proof that this evidence would rebut the testimony of Drs. Jackson and Maram that Simon had an “antisocial personality disorder.” Defense counsel argued that, because one criterion

for a diagnosis of antisocial personality disorder is “consistent irresponsibility as indicated by a repeated failure to sustain consistent work behavior,” evidence of Simon’s invention drawings was relevant refutation. In the presence of the jury, the court then remarked: “You are asking the court to have to comment. You want to argue, okay. The most antisocial people in the world may be talented in some way. That you have that here does not mean you get to discuss it in evidence. Hitler was a great paper hanger. That isn’t proof of anything. The examples in history—I don’t know if he’d be diagnosed as anything but evil. But, nonetheless, that is not relevant to this, the one person who can draw and another cannot. One person can do a wonderful diagram, another cannot. There’s no relevance to this. And now you’ve now been allowed to make several speeches about it. My error here is having allowed that ad infinitum. Now let’s proceed within the realm of evidence.”

The next day, defense counsel moved for a mistrial or, in the alternative, sought that the jury be admonished regarding the court’s comment. The court denied the motion for mistrial, but admonished the jury as follows: “Let me also bring up yesterday after an objection was sustained and there was ongoing discussion the court impatiently wondered why we were still discussing the issue and perhaps eliciting argument on an issue about defendant’s drawings or pictures, made a comparison or argued and made a comparison to another person who might be considered antisocial, Hitler. That was inappropriate. That is—and I believe I commented but not perhaps not as loudly as for all of you to hear that that was inappropriate. That’s not a fair comparison. Anything the lawyers say, anything I say is not evidence. What I say is the law you may have to follow on occasion, but it’s not evidence. That was inappropriate. You are ordered to disregard that as a matter of law. That comparison is not fair and was not made as a comparison but more as a point about what was trying to come in or not come in and why it’s not relevant. And what I should have done is just say it’s not relevant, let’s move on. But again, I’ll repeat the instruction: Disregard any comments I made yesterday at that point or any other comments counsel make or I make or you may hear from staff or anything like that.”

Simon argues that Hitler is such an icon of evil that references to him are inherently prejudicial. In context, we disagree. Other courts have considered comparisons of a defendant to Hitler. In *People v. Pinholster* (1992) 1 Cal.4th 865, the prosecutor made the following argument: “What mitigating circumstances were presented? Nothing except a mother who loves her son. Even the most heinous person born, even Adolph Hitler, probably had a mother who loved him.” (*Id.* at p. 964.) The court held that “the reasonable juror would understand the comment as attempting to diminish the weight of defendant’s evidence in mitigation, that is, the evidence of his mother’s attachment to him.” (*Ibid.*) In *People v. Hovey* (1988) 44 Cal.3d 543. 579, the defense introduced evidence that defendant was a serious student and poet. The prosecutor, referring to other evidence that defendant had expressed strong views on “selectiv[e] breeding for intelligence” suggested that the defendant may have shared the same beliefs as Hitler. The prosecutor stated, “Nothing unusual about this [selective breeding] theory. A lot of people have had it. Hitler, good old Hitler. Hitler wrote poetry. You know, wrote a couple of other things too, and he had some real interesting theories on selective—selection and genetics breeding.” (*Id.* at p. 579.) The court held that that “the prosecutor’s remarks were not entirely inappropriate or unlinked to the evidence. . . .” (*Ibid.*)

Likewise here, the court’s intemperate reference to Hitler was a comment on the irrelevance of artistic ability to the issue of whether defendant suffered from an antisocial personality disorder. A reasonable jury would understand the court’s comment to be about the proffered evidence rather than an appraisal of defendant. Moreover, any prejudice was cured by the lengthy admonition and jury instruction given by the trial court.

DISPOSITION

The order of commitment is affirmed.

GEMELLO, J.

We concur.

JONES, P.J.

STEVENS, J.